STATES DISTRICT COURT

DISTRICT OF MAINE

UNITED STATES OF AMERICA	)	
	)	
	)	
v.	)	**CRIM. NO. 03-42-B-W**
	)	
	)	
DOUGLAS LEE CLIFFORD,	)	
	)	
Defendant	)	

RECOMMENDED DECISION ON MOTION TO SUPPRESS

Douglas Clifford was indicted on July 1, 2003, for violating federal law by knowingly possessing a firearm (an explosive bomb) that was not registered to him in the national record. Clifford has filed a motion to suppress evidence that was obtained in a search of his residence pursuant to a warrant on the grounds that the affidavit supporting the warrant contained several false material facts. (Docket No. 7.) I recommend that the Court **DENY** Clifford's motion for the following reasons.

The Probable Cause Dispute

The warrant withstands this court's probable cause scrutiny if, given the totality of the circumstances -- as set forth within the four corners of the affidavits presented to the state court judge -- there were sufficient facts to support the finding of probable cause that crimes were being committed and that evidence of the alleged crime was likely to be discovered in the premises to be searched. United States v. Schaefer, 87 F.3d 562, 565 (1st Cir. 1996). The finding of probable cause by the issuing judge is entitled to "great deference by reviewing courts." Illinois v. Gates, 462 U.S. 213, 236 (1983).

The Warrant Application

The December 23, 2002, warrant in this case was supported by an affidavit sworn by a special agent investigating drug abuse and illegal weapon possession by Clifford. (Gov't Resp. Mot. Suppress, Docket No. 11, Ex. A.) In his application the agent stated that on December 23, 2002, he was informed that a doctor had contacted the police and reported that his patient, Douglas Clifford, had been in his office on December 18, 2002, and had pulled out a revolver and flashed it around in front of the doctor.

Because of this report the agent ran a criminal background check. The report showed four Massachusetts court charges stemming from a single incident. On April 15, 1997, Clifford was charged with two counts of possession of a firearm, one count of possession of ammunition, and one count of carrying a dangerous weapon (a double edged knife). The agent called the appropriate Massachusetts district court and spoke with a clerk named Vera Larson. Larson stated that Clifford was found guilty on the two possession of firearm counts, both of which were classified as felonies. She stated that Clifford received two years of probation on each count. The other two counts were dismissed.

The agent then contacted the Maine Drug Enforcement Agency (MDEA). He told the MDEA agent that he was investigating Clifford for criminal threatening of a doctor with a weapon. The MDEA agent responded that he had a 2000 intelligence report implicating Clifford in the acquisition of drugs by deception (a class C crime); to wit, two pharmacists at a Rite Aid store reported that Clifford had received forty twenty-milligram Oxycontin tablets on April 7, 2000, from a Veterans Administration facility and ninety

eighty-milligram Oxycontin tablets from another doctor on April 9, 2000, for which he paid $800 cash.

The agent then had a conversation with the doctor who made the December revolver report. The doctor told the agent that Clifford had been sent to his office a year prior on a referral. Their next interaction was on December 10, 2002, when Clifford showed up on another referral. The doctor agreed to treat Clifford's complaints of knee and back pain but insisted on a urinalysis to make sure that he was clean from any other drugs. This test came back positive for cocaine and valium. On the December 18, 2002, follow-up visit, the doctor confronted Clifford with these results. Clifford "became aggravated" and stated: "I could have had 1500 Oxycontin for $4,000.00 but I'm trying to get them legitimately. Those pills are surfacing from the warehouse robbery and are available now." The doctor told the agent that Clifford then reached into his right jacket pocket and pulled out a silver revolver with black grips. As Clifford passed the weapon from hand to hand he told the doctor: "I live in a different world than you, I have to protect myself all the time. My friends and co-workers would offer me a line of coke like you would offer someone a drink." Nervous, the doctor asked Clifford to put the weapon away. The doctor issued a one-week prescription for eighty-milligram Oxycontin tablets, with any further prescription to be dependent on a review of Clifford's medical needs. The doctor also reported that Clifford claimed to have a sniper's certificate and military training, the latter representation being supported in the agent's mind by the fact that Clifford was receiving health care through the Veteran's Administration.

The agent concluded that the firearms convictions that occurred in Massachusetts and the doctor's observations of a revolver on December 18 demonstrated Clifford's

potential prohibited possession of firearms. Additionally the urinalysis results from December 10 showed cocaine use and Clifford admitted using stimulants, facts that prompted the agent to request a no-knock warrant because of officer safety concerns. The agent also reported that in his efforts to confirm Clifford's address he learned from a local sheriff's deputy that the deputy had responded to Clifford's residence recently to investigate an auto accident. While in the home the deputy observed a small black revolver in an opened drawer but took no action because he was not aware that Clifford was prohibited from possessing firearms.

The warrant authorized a search for:

> Scheduled drugs, including but not limited to Firearms, Cocaine, drug paraphernalia (including that as defined in 17-A M.R.S.A. 1111-A); money intended for or obtained from the sale or purchase of scheduled drugs; papers, computers and other affects relating to business records pertaining to the possession, furnishing or trafficking in schedule drugs; evidence of dominion and control of the evidence listed above, and any firearms or ammunition all of which are contraband and evidence of the offenses of possession, furnishing, and/or trafficking scheduled drugs, and possession of a firearm by a prohibited person and criminal threatening with a dangerous weapon which are seizable pursuant to Maine Rule of Criminal Procedure 41 and/or Maine Rule of Civil Procedure 801.

Clifford's Challenge

In his motion to suppress, Clifford maintains that the search warrant was sought and obtained on the basis of several falsities. First, with respect to the allegation that the agent spoke to a Massachusetts district court clerk who indicated that Clifford had been convicted of two counts classified as felonies, Clifford argues that a "cursory review of the records and the State Statutes clearly indicate and the Government now confirms that those charges are not in fact felonies under the federal law and that Mr. Clifford is not a felon." Two, the information concerning Clifford's 2000 Oxycontin acquisition was

"incredibly stale" and was hearsay. Three, the information in the application from the doctor distorted the truth as it is not alleged (I assume here that Clifford means in the indictment rather than the application) that Clifford threatened or intimidated the doctor. Furthermore, "[t]he incident in question happened five days prior to the search warrant being requested and in no way establishes any on-going criminal activity." Four, the results of the December 10 urinalysis did not give probable cause for a search warrant that issued December 23. And, five, "the sniper's certificate and the black revolver in the home are irrelevant [because] Mr. Clifford is not a felon."

After the United States pointed out in its response to the motion to suppress that Clifford had not filed a memorandum or affidavit in support of his motion, Clifford filed the following memorandum of law:

> The Government obtained a search warrant based on materially false allegations (namely that the Defendant was a felon in possession of firearms and that he had been previously "implicated" in a Class C felony and he may have threatened a physician). Franks v. Delaware, 438 U.S. 154 (1978).
>
> Stripping away the false hoods and inaccuracies there is insufficient evidence to uphold the granting of the search warrant in this case.

(Mem. Law Supp. Def's Mot. Suppress, Docket No. 13.) Clifford has executed an affidavit in support of his motion.[1] It states:

1. I am not a felon. I have no prior felony convictions. The charges in Massachusetts are misdemeanors. If anyone checked with a lawyer in Massachusetts (such as the prosecutor's office instead of a Court Clerk) they would have known that. The Government acknowledges in the discovery that I am not a felon.
2. I never threatened or tried to intimidate Dr. Snyder. The incident in question happened five days prior to the Search Warrant.
3. I was never convicted nor even charged with any Class C charge despite the assertion in the affidavit that I was "implicated": the affidavit provides no further explanation.

[1] To this date the Court has only a facsimile copy and not the original, which has been promised.

4. My firearms have been appropriately registered with the Bureau of Alcohol, Tobacco & Firearms.

Discussion

Two things are apparent vis-à-vis Clifford's conceptualization of the merits of his motion. First, Clifford seems to believe, judging by the thrust of his brief memorandum, that his contention that the warrant application was "based on materially false allegations" is demonstrated by the fact that Clifford was not ultimately indicted on a felon in possession or criminal threatening charge. Two, Clifford is not alleging either that the agent who swore out the application intentionally included information that he knew to be false or that the agent had any reason to doubt the veracity of the information in the application. At most Clifford is arguing that the agent acted with a reckless disregard for the truth when he prepared the application. Accordingly, with respect to any claim that might form the basis for a Franks hearing, I "consider only whether it was made with reckless disregard for the truth and, if it was, whether it was necessary to the finding of probable cause." United States v. Ranney, 298 F.3d 74, 78 (1st Cir. 2002).

Taking the less weighty arguments first, I disagree with Clifford that the agent's insertion of information concerning Clifford's two, close-in-time 2000 Oxycontin prescriptions is irrelevant or misleading. As for the relevance, the exchange between Clifford and the doctor on December 18, 2002, revealed that Clifford was currently in the market for Oxycontin and was willing to pursue illegitimate as well as 'legitimate' means of obtaining the drug. It was for the issuing judge to weigh the relevance of the two known Oxycontin-related incidents, and to determine whether it was probative of persistence. With respect to the tendency to mislead, the issuing judge was not told that

Clifford was charged or convicted of an offense but only that he was implicated, a phrase that only served to highlight the absence of formal proceedings.

I also do not find merit in Clifford's argument that the inclusion of information on the December 10 urinalysis did not support probable cause for a search warrant that issued December 23 because of the passage of time. Not only was the passage of time minimal, see United States v. Feliz, 182 F.3d 82, 87 (1st Cir 1999), these test results are tied to the information relayed by the doctor to the agent regarding the doctor's conversation with Clifford on December 18. On that day, Clifford stated that his was a world in which he was offered cocaine by his friends and co-workers as if it were no more than a drink. The combination of the test results, Clifford's own description of his drug use as a ongoing presence in life, and his intemperate insistence on the Oxycontin prescription along with his profession of a willingness to resort to less legitimate means of obtaining the drug is sufficient factual fodder for the issuing judge to conclude on December 23 that drug-related crimes were being committed by Clifford and that evidence of these crimes was likely to be discovered in the premises to be searched.

With respect to the warrant application's representation concerning Clifford's threatening conduct towards the doctor, Clifford is arguing not that the warrant application distorted what the doctor reported to the agent but challenges what the doctor reported to the agent. There is nothing on this record to suggest that the agent had any reason to second guess the report of the doctor. Clifford's affidavit states that he never threatened or tried to intimidate the doctor but this does not undercut the agent's report that the doctor informed him that he felt nervous when Clifford reached into his right jacket pocket and pulled out a revolver and began passing the weapon from hand to hand.

Nor is there evidence that the doctor did not tell the agent that Clifford stated: "I live in a different world than you, I have to protect myself all the time." These are the representations in front of the issuing judge making the probable cause determination. Clifford's contest with the doctor on what he intended and how it might have impacted the doctor would certainly be relevant to the sustainability of criminal threatening charges (apparently contemplated at the time of the warrant's execution)[2] but they do not, standing alone, cast any shadow over what the agent believed upon hearing the doctor's description of the interaction, which is the key concern in this probable cause analysis.

Clifford also contends that this incident with the doctor could not "establish any ongoing criminal activity" because it preceded the warrant application by five days. This is no more than an arrow shot in the dark. Many of the same points made with respect to Clifford's attack on the December 10 urinalysis apply here. Indeed, this conversation coupled with the test results revealed to the issuing judge that there was evidence that Clifford was regularly using cocaine, was determined to get Oxycontin one way or the other, and carried and actually displayed a firearm during a doctor's appointment in which he was confronted with the test results and faced the denial of a prescription. Furthermore, the statement supporting the affidavit demonstrates that the agent first received the call informing him of the doctor's report on December 23, and the subsequent paragraphs indicate that he undertook a flurry of investigation involving criminal background and motor vehicle records, calls to the Massachusetts district court, a follow-up conversation with the doctor, and efforts to confirm the exact target address with the assistance of local sheriffs. To credit Clifford's view of how fresh warrant

[2] The record indicates that the doctor in question did not want to bring charges stemming from his interactions with Clifford.

affidavit information must be to past judicial muster would generate overly precipitative rather than appropriately meditative warrant requests.

This brings me to Clifford's remaining challenge to the warrant; in contrast to the above argument, he contends that the agent did not take enough time to fully determine the misdemeanor verses felony nature of his Massachusetts convictions. Clifford's contention in his affidavit is that all that the agent needed to do and what the agent should have done was to check with a Massachusetts lawyer, perhaps the prosecutor's office, to clarify the status of the convictions. It is also Clifford's contention that a cursory review of the record and the state statute would have been enough for the agent to determine that he was not a felon and not a proper target of felon in possession charges and that the characterization of Clifford as a felon mislead the issuing judge.

A failure to take a certain approach to an investigation or a "failure to probe further does not amount to reckless disregard" of the truth. Ranney, 298 F.3d at 78. Furthermore, I certainly do not agree that a cursory review of the records and the applicable state statutes reveals that the convictions were misdemeanors carrying a two year term rather than felonies. The docket entries do not specify felony or misdemeanor and the applicable statutory provisions (different from Maine law) do not, with merely a cursory examination, illuminate this status. The fact that the United States has agreed after a more extensive investigation by legal counsel that Clifford's convictions were not felonies and, thus, that Clifford cannot be charged as a felon in possession, does not mean that at the time of the search warrant the agent aware of the Massachusetts clerk's unequivocal description of the convictions as felonies was justified in believing that this

was Clifford's status and that he could and should have included it in the warrant application.[3]

What is more, the validity of the warrant did not rise or fall on the felony nature of the Massachusetts convictions. The thrust of the warrant authorization concerned drugs and any associated evidence, including the possession of a firearm is association with drug activity. With respect to the possession of the firearm by a prohibited person, this was listed last in addition to or in the alternative to criminal threatening. If the Massachusetts convictions were excised from the warrant application the issuing judge could have reasonably identified probable cause in the remaining portions of the application. Probable cause for the search inhered in the drug and firearm allegations alone and the allegedly false statements about Clifford's status as a felon were not necessary to the finding of probable cause. Franks, 438 U.S. at 156.[4]

Looking at the four corners of the affidavits presented to the state court judge I conclude that there were facts sufficient to support the findings of probable cause that drug/firearm crimes had been or were being committed by Clifford and that evidence of such crimes was likely to be discovered in the premises to be searched. Schaefer, 87 F.3d at 565; see also United States v. Villarman-Oviedo, 325 F.3d 1, 9 (1st Cir. 2003) (asking "if the facts set forth in the application were minimally adequate to support the

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[3] Even if there were a probable cause infirmity with this warrant, the facts of this case would support the denial of Clifford's motion based on the United States v. Leon good faith exception to suppression. See 468 U.S. 897, 920 (1984).

[4] Clifford also complains that the information in the warrant application concerning Clifford's sniper certificate and military background is irrelevant because he was not properly subject to investigation on the grounds that he was a felon in possession. Actually, it is not clear to me how this information on its face would sway the issuing judge on any of the grounds for the search, including being a felon in possession, as these 'credentials' are not inherently suspicious and the fact that Clifford had some past training with firearms does not demonstrate that he was currently in possession of firearms. If I were confronted with the application for this warrant the allegation that Clifford revealed this information to his doctor would buttress the conclusion that he intended to threaten and intimidate the doctor into prescribing the Oxycontin.

determination that was made"); United States v. Vigeant, 176 F.3d 565, 569 (1st Cir. 1999) ("Probable cause exists when the affidavit demonstrates in some trustworthy fashion the likelihood that an offense has been or is being committed.). I also conclude that Clifford has not made "a substantial preliminary showing that a false statement knowingly and intentionally, or with reckless disregard for the truth, was included by the affiant in the warrant affidavit," Franks, 438 U.S. at 155, and even if he could demonstrate that the agent here made such statements, the statements concerning the felonious nature of Clifford's Massachusetts convictions were not "necessary to the finding of probable cause," id. at 156.

Conclusion

For the reasons stated I **RECOMMEND** that the Court **DENY** Clifford's motion to suppress.

NOTICE

A party may file objections to those specified portions of a magistrate judge's report or proposed findings or recommended decisions entered pursuant to 28 U.S.C. § 636(b)(1)(B) for which de novo review by the district court is sought, together with a supporting memorandum, within ten (10) days of being served with a copy thereof. A responsive memorandum shall be filed within ten (10) days after the filing of the objection. Failure to file a timely objection shall constitute a waiver of the right to de novo review by the district court and to appeal the district court's order.

September 4, 2003.

Margaret J. Kravchuk
United States Magistrate Judge

U.S. District Court
District of Maine (Bangor)

CRIMINAL DOCKET FOR CASE #: 1:03-cr-00042-JAW-ALL
Internal Use Only

Case title: USA v. CLIFFORD
Other court case number(s): None **Date Filed:** 07/01/03
Magistrate judge case number(s): None

Assigned to: JUDGE JOHN A. WOODCOCK JR
Referred to:

Defendant(s)

DOUGLAS LEE CLIFFORD (1) represented by **JOSEPH BALDACCI**
P.O. BOX 1423
6 STATE STREET, SUITE 403
BANGOR, ME 04402
(207) 945-3333
Email: jmbaldacci@aol.com
LEAD ATTORNEY
ATTORNEY TO BE NOTICED
Designation: CJA Appointment

Pending Counts	**Disposition**
26:5861(d) 5845(a)(8)and (f) Possession of an Unregistered Firearm/Destructive Device/Explosive Bomb (1)	

Highest Offense Level (Opening)

Felony

Terminated Counts	**Disposition**
None	

Highest Offense Level (Terminated)

None

Complaints	**Disposition**
None	

Plaintiff

USA represented by **JAMES L. MCCARTHY**
U.S. ATTORNEY'S OFFICE
P.O. BOX 2460
BANGOR, ME 04402-2460
945-0344
Email: james.mccarthy@usdoj.gov
LEAD ATTORNEY
ATTORNEY TO BE NOTICED